

Spring 1978

Interspousal Electronic Surveillance and Title III

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Interspousal Electronic Surveillance and Title III, 12 Val. U. L. Rev. 537 (1978).

Available at: <https://scholar.valpo.edu/vulr/vol12/iss3/3>

This Notes is brought to you for free and open access by the Valparaíso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaíso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



NOTES

INTERSPOUSAL ELECTRONIC SURVEILLANCE AND TITLE III

*The actors are, it seems, the
usual three:
Husband, and wife, and lover.**

The intrigue which has always surrounded husband, wife, and the extra-marital lover has recently taken on a new sophistication. Electronic surveillance devices have become the tools of suspicious spouses seeking factual evidence of their marital partners' infidelities for use at divorce, custody, and support hearings.¹ While the full extent of intermarital spying cannot be documented, it is likely that it occurs with surprising frequency.² Interspousal electronic surveillance, a natural result of the contemporaneous increase in marital disharmony³ and technological developments, has proved itself to be a difficult legal subject in the courts.

In the few intermarital electronic surveillance cases which have reached the courts, the central issue has been the applicability and effect of Title III, of the Omnibus Crime Control and Safe Streets Act of 1968.⁴ The passage of Title III was a congressional response to the widespread use and abuse of electronic surveillance devices within the United States.⁵ The Act's dual purpose is to protect the privacy of all oral and wire communications and to define the circumstances in which governmental electronic surveillance is permissible.⁶ The provisions of Title III prohibit all private interception of wire communication⁷ and provide that the fruits of such sur-

* GEORGE MEREDITH, *Modern Love IV*.

1. A. WESTIN, *PRIVACY AND FREEDOM* 111 (1967).

2. "Several leading investigators have suggested to the author that forty to seventy-five per cent of the average private investigator's surveillance is done in 'matrimonial' cases." *Id.*

3. One in three marriages ends in divorce. See K. DECROW, *SEXIST JUSTICE* 161 (1974).

4. 18 U.S.C. §§ 2510 *et seq.* (1970).

5. S. REP. NO. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2153 [*hereinafter* cited as S. REP. NO. 1097].

6. *Id.*

7. 18 U.S.C. § 2511 (1)(a) (1970).

veillance are inadmissible in all judicial proceedings.⁸ Additionally, the Act prescribes both civil and criminal penalties for those who violate its proscriptions.⁹

Despite the plain language of Title III, some courts¹⁰ have refused to apply the prohibitions and penalties of the Act to intermarital surveillance. These courts hold that Congress did not intend Title III to prohibit interspousal electronic surveillance.¹¹ Decisions which have held that there is an interspousal exception to Title III are the result of judicial concern over the Act's effect on our federalist system and the institution of marriage. These courts assert that if the Act would be found to provide a federal remedy for a marital grievance, the traditionally exclusive power of the states to regulate domestic conflicts would be usurped.¹² They also emphasize that in civil cases the application of Title III would abrogate the doctrine of interspousal immunity still in effect in a majority of the states.¹³ Finally, these courts express reluctance to impose between marital partners the individual privacy protections contained in the Act.¹⁴ Notwithstanding these grounds for establishing an interspousal exception to Title III, other courts have held that the federal legislation does control intermarital electronic surveillance.¹⁵

While the foremost question raised in present case law is whether Title III's provisions govern interspousal electronic surveillance, the lack of uniformity among the courts regarding the applicability of Title III has left other legal issues unsettled. Though some authority presently exists for an interspousal exception to Title III,¹⁶ courts have had difficulty determining the particular factual circumstances in which interspousal immunity to Title III

8. 18 U.S.C. § 2515 (1970).

9. 18 U.S.C. §§ 2511, 2520 (1970).

10. *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 489 U.S. 897 (1974); *Beaber v. Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974).

11. *Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir.), *cert. denied*, 489 U.S. 897 (1974); *Beaber v. Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 910, 914 (1974).

12. *See, e.g., Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir.), *cert. denied*, 489 U.S. 897 (1974).

13. *Id.* at 806 n.7.

14. *Id.* at 805.

15. *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); *Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975); *Rickenbacker v. Rickenbacker*, 290 N.C. 373, 226 S.E.2d 347 (1976).

16. *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 489 U.S. 897 (1974).

should be a valid defense.¹⁷ In addition, the courts have not reached agreement on whether the fruits of intermarital electronic surveillance are admissible in domestic hearings.¹⁸

It is the purpose of this note to demonstrate that Congress did intend to include interspousal electronic surveillance within the scope of Title III, and that the statute's civil and criminal penalties should be applicable to spouses found guilty of electronic eavesdropping on their marital partners. The discussion also emphasizes the necessity of excluding the fruits of intermarital electronic surveillance as evidence in domestic proceedings. It is submitted that these applications of the Act would have a deterrent effect on interspousal surveillance, an activity which contributes to marital disharmony and sometimes irreparably damages otherwise viable marriages. Additionally, it will be shown that applying Title III to interspousal electronic eavesdropping would have the positive effect of protecting the privacy of spouses as individuals and would be in harmony with the trend toward establishing the legal individuality of marital partners. The note concludes with a description of the narrow factual circumstances in which the defense of interspousal immunity should be available, should the courts determine that Title III does not control intermarital electronic surveillance and that there is in fact an interspousal exception to Title III. Yet it is the contention of this note that Congress intended marital electronic eavesdropping to fall within Title III's flat prohibition on the use of electronic surveillance devices by private citizens.

LEGISLATIVE INTENT BEHIND TITLE III

At the center of the legal controversy surrounding interspousal electronic surveillance is the question of whether Congress intended to ban electronic surveillance between marital partners when it passed Title III. The disagreement among the courts has resulted despite clear language in Title III which proscribes all private interception of wire communications:

- (1) Except as otherwise specifically provided in this chapter any person who . . .

17. *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 489 U.S. 897 (1974); *Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975).

18. *Markham v. Markham*, 272 So. 2d 813 (Fla. 1973), *aff'g* 265 So. 2d 59 (Fla. App. 1972); *In Re Marriage of Lopp*, ____ Ind. ____, 378 N.E.2d 414 (1978), *rev'g* ____ Ind. App. ____, 370 N.E.2d 977 (1977); *Rickenbacker v. Rickenbacker*, 290 N.C. 373, 226 S.E.2d 347 (1976); *Beaber v. Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974).

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept, any wire or oral communication; shall be fined not more than \$10,000 or imprisoned not more than five years, or both.¹⁹

Notwithstanding this all-inclusive prohibition on private electronic surveillance, in 1974 the Fifth Circuit Court of Appeals ruled in *Simpson v. Simpson*²⁰ that Congress did not intend the Act to ban interspousal wiretapping.²¹ The *Simpson* decision was generally recognized by other courts²² as establishing an interspousal exception to Title III and went unchallenged until 1976, when the Sixth Circuit Court of Appeals decided the case of *United States v. Jones*.²³ In *Jones*, the court analyzed the legislative history of Title III and reached the conclusion that Congress did intend to include the marital relationship within the scope of the Act's prohibition of electronic surveillance.²⁴

Although both courts conducted extensive studies into the legislative history of Title III and reviewed essentially the same materials,²⁵ they arrived at different conclusions. An understanding of each court's decision and the disagreement which resulted re-

19. 18 U.S.C. § 2511 (1)(a) (1970). None of the exceptions delineated in the chapter include interspousal immunity to Title III.

20. 490 F.2d 803 (5th Cir.), cert. denied, 489 U.S. 897 (1974).

21. *Id.* at 805.

22. *Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975); *United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974); *Beaber v. Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974).

23. 542 F.2d 661 (6th Cir. 1976).

24. *Id.* at 667.

25. The following materials constitute the legislative history of Title III examined by the courts in *Simpson* and *Jones*: *Hearings on Wiretapping, the Attorney General's Program Before the Senate Judiciary Comm.*, 87th Cong., 2d Sess. (1962); *Hearings on Invasion of Privacy, Before the Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm.*, 89th Cong., 1st Sess. pts. 1-6, (1965-1966); *Hearings on Criminal Laws and Procedures, Before the Subcomm. on Criminal Laws and Procedures of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. (1966); *Special Inquiry on Invasion of Privacy, Before the Special Subcomm. on Invasion of Privacy of the House Gov't Operation Comm.*, 89th Cong., 1st Sess. (1965); *Hearings on the Right of Privacy Act of 1967, Before the Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm.*, 90th Cong., 1st Sess. pts. 1-2 (1967); *Hearings on the Anti-Crime Program, Before Subcomm. No. 5 of the House Judiciary Comm.*, 90th Cong., 1st Sess. (1967); *Hearings on Controlling Crime Through More Effective Law Enforcement, Before the Subcomm. on Criminal Laws and Procedure of the Senate Judiciary Comm.*, 90th Cong., 1st Sess. (1968); 114 Cong. Rec. 12280-84, 12294-98, 12982-13000, 14469-86, 14693-751, 16274-98 (1968).

quires a knowledge of the considerations which prompted Congress to pass Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

The Promulgation of Title III

Title III was passed by Congress in a time when government wiretapping and organized crime were controversial political issues.²⁶ The Supreme Court decisions of *Berger v. New York*,²⁷ and *Katz v. United States*²⁸ had formulated constitutional standards for governmental electronic surveillance. Meanwhile, the President's Crime Commission²⁹ had documented the extent of organized crime's influence and its threat to the nation's well-being.³⁰ As a result of this atmosphere the bulk of the legislative testimony, hearings, and reports regarding Title III was devoted to the use and abuse of electronic surveillance by the government in regulating organized crime.

Although governmental use of electronic surveillance was the major focus of Congress in enacting Title III, the use and abuse of electronic surveillance devices by private citizens did in fact receive attention in the legislative history of the Act. Within those materials discussing private electronic surveillance were numerous references to the problem of interspousal surveillance.³¹ Comments directed toward intermarital wiretapping included the view of a co-author of Title III, Senator Roman Hruska: "A broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations."³² Testimony

26. See, e.g., A. Barth, "Lawless Lawmen," NEW REPUBLIC, July 30, 1966; R.M. Cipes, "Kennedy, Johnson, and the FBI," NEW REPUBLIC, Dec. 24, 1966.

27. 388 U.S. 41 (1967).

28. 389 U.S. 347 (1967).

29. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

30. *Id.*

31. See S. REP. NO. 1097 at 2180, 2274; *Hearings on Invasions of Privacy Before the Subcomm. on Admin. Practice and Procedure of the Sen. Comm. of the Judiciary*, 89th Cong., 1st Sess. (1965-66). Senator Long, the Chairman of the subcommittee, identified three major areas where private electronic surveillance was widespread:

The three large areas of snooping in this field are (1) industrial, (2) divorce cases, and (3) politics. So far, we have no real justification for continuance in these three areas. If any justification exists, we will probably hear about it in the next few weeks as we intend to explore this terrain thoroughly.

Id. at 2261.

32. S. REP. NO. 1097 *supra* note 5, at 2274.

by Professor Robert Blakely,³³ who is generally credited with drafting Title III,³⁴ indicated that intermarital surveillance is one of the two broad areas comprising the bulk of private wiretapping.³⁵ This point was corroborated by other testimony in congressional hearings on Title III.³⁶

Generally, however, the *Simpson* and *Jones* courts were assessing the intent of Congress on an issue to which the legislators had devoted relatively little attention. The paucity of legislative history regarding private electronic surveillance played a significant role in the different results reached by the two courts. To the *Simpson* court, the relative lack of attention paid to interspousal surveillance by the legislators suggested that Congress did not intend to prohibit intermarital electronic surveillance.

Simpson v. Simpson: The Fifth Circuit Finds an Implied Exception

Simpson involved a suspicious husband who placed a wiretap on the family phone to record his wife's telephone conversations.³⁷ Subsequent recordings revealed only that Mrs. Simpson was not rejecting the advances of another man in a "firm and final fashion."³⁸ Whatever his reasons, the husband played the taped recordings for various neighbors, family members, and a lawyer. On the lawyer's advice, Mrs. Simpson agreed to an uncontested divorce. She then filed suit in federal district court for civil damages under Title III³⁹ for

33. G. Robert Blakey is a Professor of Law at the University of Notre Dame Law School.

34. *United States v. Giordano*, 416 U.S. at 517-18 n.7 (1974).

35. *Hearings on the Right to Privacy Act of 1967 Before the Subcomm. on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. pt. 2, at 413 (1967).

36. See, e.g., *Hearings on the Anti-Crime Program Before Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm.*, 89th Cong., 1st Sess. pt. 1, at 18 (1965-66).

37. 490 F.2d at 804.

38. *Id.*

39. 18 U.S.C. § 2520 (1970):

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

the wiretap placed on her telephone conversations. Failing in the district court, she appealed to the Fifth Circuit Court of Appeals, arguing that her claim was supported by "constitutional protections of privacy and emerging concepts of women's rights."⁴⁰

The Fifth Circuit found the sole issue to be whether Congress intended in Title III to give one spouse a civil remedy against the other.⁴¹ This narrowing of the issue reveals that the major concern of the *Simpson* court was the impact of Title III upon established concepts of federalism. The court questioned whether Congress intended to provide a federal remedy for a grievance arising between marital partners, since domestic conflicts have normally been the subject of state law.⁴² Additionally, the court was concerned that the doctrine of interspousal immunity,⁴³ still recognized by a majority of the states,⁴⁴ would be overridden by a finding that Title III provided Mrs. Simpson with an interspousal remedy and cause-of-action.⁴⁵ The court felt that these considerations of comity and federalism required that the legislative history be examined to determine if Congress intended Title III's prohibitions to include interspousal wiretapping.

The Fifth Circuit was also prompted in its examination of the legislative history of Title III by the criminal penalties available under the Act.⁴⁶ Because civil and criminal liability are apparently coterminous under the provisions of Title III,⁴⁷ the *Simpson* court emphasized that severe criminal penalties might follow from a find-

40. *Id.* The women's rights argument was considered by the court in *Markham v. Markham*, 265 So. 2d 59 (Fla. App. 1972).

41. 490 F.2d at 804.

42. *Id.* at 805.

43. The doctrine of interspousal immunity generally denies personal injury recoveries between husband and wife. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 122, at 859-60 (4th ed. 1971).

44. Thirty states and the District of Columbia still recognize interspousal immunity, although in many of those jurisdictions the recognition is limited. For a list of those states, see Comment, *Interspousal Electronic Surveillance Immunity*, 7 *TOL. L. REV.* 185, 190 n.27 (1975).

45. 490 F.2d at 806 n.7.

46. *Id.* at 809.

47. S. REP. NO. 1097, *supra* note 5, at 2156, states:

The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation.

ing that Mr. Simpson was civilly liable for the electronic surveillance of his wife.⁴⁸ On that basis, the court felt bound by the principle that criminal statutes must be strictly construed so as to avoid ensnaring behavior not meant to be prohibited.⁴⁹

Based on the principle of strict construction and its own concern over Title III's effect on federalism, the *Simpson* court sought an express indication in the legislative history that Congress intended to include intermarital electronic surveillance within the scope of the Act. Seeking this "clear expression of intent" by Congress, the court examined Title III's legislative history and found that only a small portion of Title III's legislative history was devoted to the private use of electronic surveillance devices. The relative silence of Congress on the issue of intermarital surveillance indicated to the Fifth Circuit that Congress had not contemplated, let alone intended, that Title III's penalties and prohibitions would be applied to electronic surveillance between spouses.⁵⁰

Neither did the legislative history regarding intermarital electronic surveillance satisfy the positive expression of congressional intent sought by the *Simpson* court. The testimony by Professor Blakely and private investigators regarding the extensive amount of electronic surveillance between spouses received the following treatment: "These statements suggest Congressional awareness that private individuals were using electronic surveillance techniques within their own home. However, they do not support the proposition that Congress was concerned that such activities took place."⁵¹ Apparently having overlooked Senator Hruska's statement that Title III was intended to prohibit the use of electronic surveillance by marital partners,⁵² the *Simpson* court did quote passages of testimony wherein private investigators attempted to justify their role in interspousal surveillance.⁵³ An example: "[W]e have found statistically that once the truth is out in any domestic squabble, there is a 50% better chance of a couple being reconciled. Every time we make a case, I practically feel like a surgeon who is cutting out a cancer."⁵⁴ Thus, even within the portion of Title III's legislative history devoted to interspousal electronic surveillance, it

48. 490 F.2d at 809.

49. See *Kordel v. United States*, 335 U.S. 345, 349 (1948).

50. 490 F.2d at 807.

51. *Id.* at 809.

52. See note 32 *supra* and accompanying text.

53. 490 F.2d at 808 n.14.

54. *Id.*

was the Fifth Circuit Court's conclusion that Congress had not intended to ban the use of electronic surveillance devices within the marital relationship.

While the Fifth Circuit Court did express doubt about its analysis of congressional intent,⁵⁵ it found further support for its decision in the language of another provision of the Act. Specifically, the court felt that section 2510 (5)(a)(i),⁵⁶ which exempted from the scope of Title III all conversations intercepted through the normal use of an extension phone, indicated Congress did not intend Title III to include interspousal surveillance. This conclusion was predicated upon testimony of Professor Herman Schwartz of the American Civil Liberties Union who stated with respect to the extension phone exception: "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem. . . . But this bill does not go to that and goes beyond that."⁵⁷ The court in *Simpson* considered this testimony indicative of congressional unwillingness to interject Title III's privacy protections between family members, and concluded that there was no convincing distinction between an interception achieved through the normal use of an extension phone and one accomplished through a wiretap placed on the phone by a spouse. Both methods of intercepting communications were permissible, reasoned

55. *Id.* at 810.

56. 18 U.S.C. § 2510 (5)(a)(i) (1970), provides:

(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business. . . .

The language "ordinary course of [the user's] business" was added to the Act after Professor Herman Schwartz expressed his concern in testimony before the House Judiciary Committee that the original version of the bill, which did not contain such language, would allow policemen and private intruders to enter homes and eavesdrop on extension phones without penalty. *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977). The Tenth Circuit Court of Appeals has held as a matter of law that any use of an extension phone without authorization or consent to surreptitiously record a private telephone conversation is not use in the ordinary course of business. *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974); *accord*, *Gerrard v. Blackman*, 401 F. Supp. 1189 (N.D. Ill. 1975). *But see Anonymous v. Anonymous*, 558 F.2d 677, 679 n.5 (2d Cir. 1977).

57. *Hearings on the Anti-Crime Program before Subcomm. No. 5 of the House Judiciary Comm.*, 90th Cong., 1st Sess. 901 (1967).

the court, since each resulted only in the violation of a fellow family member's privacy not protected by Title III.⁵⁸

Having determined that Title III's penalties were not applicable to interspousal electronic eavesdropping, the Fifth Circuit Court of Appeals denied Mrs. Simpson a remedy. Apparently unsure of its determination, the court concluded by limiting its decision to the particular facts of its case.⁵⁹ The *Simpson* holding went unchallenged until 1976, when the Sixth Circuit Court of Appeals decided the case of *United States v. Jones*.⁶⁰

United States v. Jones: An Alternative to the Simpson Analysis

The factual situation of *Jones* involved a husband who suspected his estranged wife of conducting an extramarital affair and so placed a wiretap on his spouse's telephone.⁶¹ After he had used recordings of his wife's telephone conversations to obtain a divorce, criminal charges based on Title III were brought against him for the surreptitious interception of her telephone conversations. In federal district court, the defendant-husband asserted *Simpson* as authority for an interspousal exception to the provisions of Title III. On the basis of *Simpson*, the district court dismissed the proceedings, and the government appealed the decision to the Sixth Circuit Court of Appeals.⁶² Unwilling to accept the *Simpson* rationale on its face, the Sixth Circuit made its own examination of the legislative intent of Congress in enacting Title III.

The *Jones* court found the conclusion of the Fifth Circuit in *Simpson* to be "questionable";⁶³ it was the opinion of the Sixth Circuit that Congress clearly intended Title III to prohibit electronic surveillance between marital partners.⁶⁴ Citing the numerous references in Title III's legislative history to the use of electronic surveillance devices in domestic relations cases,⁶⁵ the Sixth Circuit concluded that Congress was both aware of interspousal surveillance and intended it to be prohibited.⁶⁶ As to the significance of the

58. 490 F.2d at 809.

59. *Id.* at 810.

60. 542 F.2d 661 (6th Cir. 1976).

61. *Id.* at 663.

62. *Id.*

63. *Id.* at 671.

64. *Id.* at 667.

65. *Id.* at 667-669.

66. *Id.*

relatively little attention devoted to private electronic surveillance in the legislative history of Title III, the Sixth Circuit stated:

We also dispute the implication in *Simpson* that the limited attention given to the private electronic surveillance in the legislative history, relative to that afforded surveillance by law enforcement personnel, reflects Congress' equivocation on the scope of Title III in the private sector. The more plausible explanation is that it was the consensus of Congress that there is "no justification" for private electronic surveillance so that debate centered on the more volatile issue of law enforcement surveillance. This interpretation is consistent with the pervasive theme of Title III that electronic surveillance should be sharply curtailed and in no instance be undertaken without strict judicial authorization and supervision.⁶⁷

The Sixth Circuit went on to suggest that if Congress had intended to provide an interspousal exception to Title III, it would have included it among those exceptions expressly stated within the statutory provisions.⁶⁸

Although the *Jones* court directly attacked the *Simpson* conclusion that Congress did not intend Title III to prohibit interspousal electronic surveillance, it carefully noted that its decision was distinguishable from *Simpson*.⁶⁹ While *Simpson* was concerned with the availability of a civil remedy to a spouse under Title III, *Jones* involved the question of whether Title III's criminal penalties were applicable to a spouse found guilty of wiretapping his marital partner. Since the doctrine of interspousal immunity is a tort concept and has never been applied to criminal law,⁷⁰ the Sixth Circuit's decision in *Jones* could not preempt the state tort law doctrine and result in a conflict between state and federal laws. Instead, as the Sixth Circuit stated, the fact that one party to the intercepted conversation was the spouse of the defendant had "no bearing whatsoever on the availability of criminal penalties."⁷¹

67. *Id.* at 671.

68. *Id.*

69. *Id.* at 672.

70. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 122, at 859 (4th ed. 1964).

71. 542 F.2d at 672. The *Jones* court buttressed its conclusion by the indication in the legislative history that civil and criminal liability should be coterminous. *Id.* at 672 n.7, citing S. REP. NO. 1097, *supra* note 5. See note 47 *supra*.

In addition to this criminal-civil legal distinction between *Jones* and *Simpson*, the Sixth Circuit found the two cases distinguishable on their facts.⁷² Prior to the wiretapping in question in *Jones*, the husband had separated from his wife and moved out of the marital home. Subsequent to the separation the wife obtained a restraining order to prevent the husband from coming onto the premises.⁷³ Under these circumstances, the Sixth Circuit Court found inapplicable the interspousal exception to Title III recognized in *Simpson*,⁷⁴ where the parties were still residing together at the time of the surveillance-in-question.

Although the Sixth Circuit distinguished *Jones* from *Simpson* both legally and factually, it did not suggest that the *Simpson* conclusion as to congressional intent was valid. The Sixth Circuit apparently emphasized the legal and factual distinctions between the two cases for the purpose of establishing alternative bases for its decision should the Supreme Court later find that Congress did impliedly intend an interspousal exception to Title III. In its conclusion the *Jones* court emphasized that it did not agree with the result of *Simpson*:

However, the plain language of the section and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps. It is not for this court to question the wisdom of Congress and to establish an implied exception to a federal statute by judicial fiat.⁷⁵

On the basis that Congress did not intend an interspousal exception to Title III, the Sixth Circuit held that the rationale of *Simpson* did not control *Jones*. Accordingly, it reversed the decision of the district court and remanded the case for trial.⁷⁶

The Better Precedent—Simpson or Jones?

The different conclusions reached in the *Jones* and *Simpson* cases as to the intent of Congress in enacting Title III have left unsettled the question whether interspousal surveillance is prohibited conduct. The few courts which have addressed the question in the wake of the conflicting decisions have continued the *Simpson-Jones* discord. Absent a Supreme Court decision on the issue, *Simp-*

72. 542 F.2d at 673.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

son and *Jones* will continue to serve as bases for separate schools of case authority. If inconsistency and ad hoc determinations regarding the applicability of Title III to intermarital surveillance are to be avoided, courts must scrutinize the opinions of the *Jones* and *Simpson* courts in order to determine which decision should control future intermarital surveillance case law.

An analysis of the conflicting *Simpson-Jones* decisions regarding Title III's applicability to interspousal electronic surveillance should begin with the recognition that the plain language of the Act prohibits such conduct. The explicit language of Title III states that "any person" who violates the prohibition on private electronic surveillance is liable to punishment "except as otherwise specifically provided."⁷⁷ With the exclusion of the extension phone exception noted by the *Simpson* court,⁷⁸ none of the exceptions included in the statute relate to private electronic surveillance. The extension phone exception, which exempts from the scope of Title III all conversations intercepted through the normal use of an extension phone, does not suggest that Congress intended Title III to be inapplicable to interspousal wiretapping, as *Simpson* found. Common sense suggests the necessity for the extension phone exception to Title III. Wiretapping statutes must avoid ensnaring the innocent person who, in the *normal use* of an extension phone,⁷⁹ unwittingly invades the privacy of another. The deliberate extension phone eavesdropper operates without electronic devices, is readily detectable, and must be present to accomplish his/her aim. On the other hand, the wiretapper escapes detection and can easily intercept conversations while absent from the premises. It is the latter activity which Congress sought to prohibit, for it is the deliberate and surreptitious qualities of the wiretapper which create the greatest danger to individual privacy. As the extension phone exception is the only provision of Title III related to private interception of wire communication, no statutory construction of Title III reveals a general interspousal exception to the Act.

The *Simpson* court, in initiating the statutory interpretation of Title III, violated the long-standing principle that a court will not

77. 18 U.S.C. § 2511 (1) (1970). According to the Senate Report, the definition of "person" contained in 18 U.S.C. § 2510 (6) (1970), defines the parameters of Title III to include any individual, corporation, partnership, or other legal entity. The definition excludes only governmental units and is otherwise intended to be "comprehensive." S. REP. NO. 1097, 90th Cong., 2d Sess. 90-91, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2179.

78. 490 F.2d at 805.

79. See note 56 *supra*.

refer to legislative history for purposes of construction when a statute is clear on its face.⁸⁰ The Fifth Circuit, as previously noted,⁸¹ was prompted in its search of the legislative history by considerations of federalism. In particular, the court pointed to the fact that Title III, if applied to interspousal surveillance, would preempt the state doctrine of interspousal immunity still in effect in a majority of states. The significance attached to the doctrine is questionable.

Since its conception in the common law during the eighteenth century, the role of the doctrine of interspousal immunity has steadily diminished.⁸² Modern-day support for the doctrine is predicated upon the desire to preserve domestic tranquility and prevent collusive suits,⁸³ policy considerations not present in interspousal wiretapping cases. The role of the doctrine of interspousal immunity as a factor necessitating a determination of legislative intent was exaggerated by the court in *Simpson*. As noted in *Jones*, Congress could have easily included the doctrine within the provisions of Title III if it had so intended.⁸⁴

The *Simpson* court also was concerned that Title III would infringe on the traditional province of the state courts, the law of domestic relations, if applied to intermarital surveillance. While there is merit in this consideration, the legislative history of Title III clearly indicates that Congress was aware of and intended that the Act should cover electronic surveillance between husband and wife.⁸⁵ As the *Jones* opinion revealed, the congressional debate indicates that Congress was concerned with protecting individual privacy from invasion through electronic surveillance devices, and that Congress was aware that a significant amount of the private abuse of electronic surveillance occurs within the marital relationship.⁸⁶

An example of the abuse of electronic surveillance which Congress sought to curb in Title III occurred in *Simpson*. After the husband had wiretapped his wife's telephone and recorded her private

80. 542 F.2d at 667; accord, *United States v. Oregon*, 366 U.S. 643, 648 (1961) (where statutory language is clear, court will not refer to legislative history for purposes of construction). See also C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 48.01, at 182 (4th ed. 1973).

81. See notes 42-45 *supra* and accompanying text.

82. Comment, *Toward Abolition of Interspousal Tort Immunity*, 36 MONT. L. REV. 251 (1975).

83. 542 F.2d at 672.

84. *Id.* at 671.

85. See notes 31-36 *supra* and accompanying text.

86. *Id.*

conversations, which revealed only meager inferences of infidelity, he played the recordings to various neighbors, family members and a lawyer.⁸⁷ The public humiliation of individuals through the invasion of their privacy by electronic surveillance devices is an activity that Congress sought to prohibit, but which is reinforced by court decisions that fail to apply the all-inclusive prohibition of Title III on private use of electronic surveillance devices.

In the future courts should recognize the invalidity of the *Simpson* holding and find in accordance with the plain language of and legislative intent behind Title III that interspousal electronic surveillance is prohibited. Decisions which find an interspousal exception to Title III only encourage abuse of individual privacy rights between marital partners by making the fruits of interspousal surveillance admissible in domestic hearings.

THE ADMISSIBILITY OF THE FRUITS OF INTERSPOUSAL SURVEILLANCE

The purpose of nearly all interspousal electronic surveillance is to gain evidence for use at divorce, custody, and support hearings.⁸⁸ Title III requires exclusion of evidence obtained through electronic surveillance in all judicial proceedings.⁸⁹ While Title III apparently eliminates the incentive for spouses to use electronic surveillance devices to spy on their marital partners, the courts⁹⁰ which have ap-

87. 490 F.2d at 805.

88. See note 1 *supra*.

89. 18 U.S.C. § 2515 (1970):

. . . No part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . or other authority of the United States, a State, or a political subdivision thereof if disclosure of that information would be in violation of this chapter.

As the court noted in *Rickenbacker v. Rickenbacker*, 290 N.C. 373, 226 S.E.2d 347, 352 (1976), none of the exceptions to the proscription contained in this chapter of Title III are applicable to interspousal electronic surveillance.

90. *Rickenbacker v. Rickenbacker*, 290 N.C. 373, 226 S.E.2d 347 (1976); *Beaber v. Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974). One state court in *Markham v. Markham*, 272 So. 2d 813 (Fla. 1973), *aff'g* 265 So. 2d 59 (Fla. App. 1972), refused to apply Title III to the question. The determination that state law should determine the issue was mistakenly based on language in *Katz v. United States*, 389 U.S. 347 (1967), which indicated that the protection of the general right of privacy—an individual's right to be free from the intrusions of other private persons—was the province of the states. The *Markham* decision is clearly erroneous, for the Supreme Court held in 1939 that Congress had the power, based on the commerce clause, to regulate intrastate wiretapping. *Weiss v. United States*, 308 U.S. 321 (1939). The court in *Simpson* recognized that Congress clearly had the power under the commerce clause to pass legislation affecting wire communications. 490 F.2d at 805 n.6.

plied Title III to the question of the admissibility of such evidence at marital proceedings are not in agreement. In *Rickenbacker v. Rickenbacker*,⁹¹ the North Carolina Supreme Court applied Title III's inadmissibility requirement to evidence of spousal infidelity gained through the use of a wiretap. In *Beaber v. Beaber*,⁹² however, an Ohio court ruled similar evidence was admissible at a domestic hearing.

Rickenbacker involved a husband and wife who had separated. The wife continued to occupy the marital premises, but the husband continued to pay the telephone bills. At his request, the telephone company installed an extension phone in his office to which he attached a sound-activated tape recorder, ostensibly for the purpose of determining if his estranged wife was referring his business calls to his office. Subsequent recordings revealed that the wife was engaged in adulterous conduct. To defeat her claim for alimony, the husband sought to introduce the taped conversations into evidence. The wife filed a motion to suppress the evidence based on Title III, while the husband relied on *Simpson* to support his contention that Title III's inadmissibility requirement was inapplicable.⁹³

The North Carolina Supreme Court held that the evidence was inadmissible since it had been obtained through the use of electronic surveillance prohibited by Title III.⁹⁴ In reaching its decision, the court employed analysis virtually identical to that shortly thereafter used by the Sixth Circuit Court of Appeals in *United States v. Jones*.⁹⁵ The North Carolina Supreme Court noted that the plain language of Title III prohibited interspousal electronic surveillance

Immediately prior to the publication of this note, the Indiana Supreme Court became the third tribunal to rule on this question. In re Marriage of Lopp, ___ Ind. ___, 378 N.E.2d 414 (1978), *rev'g* ___ Ind. App. ___, 370 N.E.2d 977 (1977). Mr. Lopp had obtained recordings of his wife's telephone conversations through the use of electronic surveillance, and Mrs. Lopp contended that threats of disclosure of the tapes' contents coerced her signature on a provisional custody order. Indiana's highest court held that the trial judge properly admitted the tapes into evidence for the purpose of determining the validity of Mrs. Lopp's claim that she had been blackmailed. *Id.* at 422. The court expressly limited its decision to the particular facts of its case, and noted that a contrary decision would lead to "an illogical and absurd result" not intended by Congress. *Id.* The Lopp opinion provides a lengthy analysis of the controversy surrounding the applicability of Title III to interspousal electronic surveillance.

91. 290 N.C. 373, 226 S.E.2d 347 (1976).

92. 41 Ohio Misc. 95, 322 N.E.2d 910 (1974).

93. 226 S.E.2d at 348, 351.

94. *Id.* at 352.

95. 542 F.2d 661 (6th Cir. 1976).

and concluded that Congress had intended to prohibit such conduct in its passage of the Act. Although the court in *Rickenbacker* carefully distinguished *Simpson*, it nevertheless characterized the *Simpson* decision as "patently doubtful."⁹⁶

Two years prior to the *Rickenbacker* decision, however, an Ohio court in *Beaber v. Beaber*⁹⁷ based its decision that evidence obtained through interspousal electronic surveillance was admissible on the *Simpson* conclusion that Title III did not apply to interspousal wiretapping. If Title III did not apply to interspousal wiretapping, the *Beaber* court reasoned, then the question of the admissibility of the fruits of interspousal surveillance was not governed by the inadmissibility requirement of the Act.⁹⁸ Accordingly, that court admitted the evidence under the long-standing general principle that absent any statutory provision to the contrary, evidence obtained, whether legally or illegally, by a private person is admissible in a marital proceeding.⁹⁹

In addition to basing its opinion on the authority of *Simpson*, the *Beaber* court emphasized that the evidence should be admissible on the general proposition that "what occurs behind the marital veil is and should be the private concern of the marital partners."¹⁰⁰ An errant spouse who violates the marriage contract within the confines of the home and so avoids the scrutiny of the public, the court reasoned, should be subject to exposure through any means available to the other spouse.¹⁰¹ The court concluded that an exclusion of evidence gained through interspousal wiretapping would deprive a spouse of the "only material, creditable [sic] evidence"¹⁰² available as to the errant spouse's infidelity.

The decision of the *Beaber* court, within its particular factual context, is an appealing application of equity principles. The intercepted conversations in *Beaber* revealed that the wife was involved in an extramarital affair.¹⁰³ It was the wife, however, who had filed for divorce, claiming gross neglect and extreme cruelty. For impeachment purposes, the court admitted the taped conversations

96. 226 S.E.2d at 352.

97. 41 Ohio Misc. 95, 322 N.E.2d 910 (1974).

98. 322 N.E.2d at 914.

99. See, e.g., *Sackler v. Sackler*, 15 N.Y.2d 40, 255 N.Y.S.2d 803, 203 N.E.2d 481 (1964) (analyzed in 5 A.L.R.3d 664).

100. 322 N.E.2d at 915.

101. *Id.*

102. *Id.*

103. *Id.* at 914.

which revealed her infidelity and buttressed her husband's cross-complaint for divorce.¹⁰⁴ Thus, the *Beaber* decision represents the general equity principle that the court will not reward the plaintiff who has contributed to the conflict,¹⁰⁵ and thus satisfied the common morality and sense of justice.

While the *Beaber* court admitted the evidence for purposes of impeachment, it emphasized that the fruits of interspousal electronic surveillance should be admitted in domestic hearings for direct evidentiary purposes.¹⁰⁶ Both rationales for the *Beaber* court's decision are arguments for the admissibility of evidence gained through interspousal surveillance, and are not limited to admissibility for impeachment purposes only. *Beaber* thus stands for the proposition that all evidence gained through the use of electronic surveillance devices by a spouse is or should be admissible at domestic hearings.

As a result of the *Beaber* decision an incentive remains for individual spouses to use electronic surveillance to spy on their marital partners. Since the major purpose of most interspousal surveillance is to gain evidence for use at domestic hearings,¹⁰⁷ had the court held such evidence inadmissible it would have discouraged the surreptitious electronic surveillance between spouses.

The consequence of *Beaber* is unfortunate, for in particular circumstances the result of interspousal surveillance may be to irreparably damage otherwise viable marriages. As in *Simpson*, the conversations intercepted by a spouse's use of electronic surveillance devices may reveal only the most meager inferences of infidelity. Nonetheless, these inferences, even if baseless, may increase or create marital distrust and disharmony. The more fragile the marital relationship, for whatever reason, the greater the likelihood that the meager inference of infidelity will be a cause for divorce. Generally, marital harmony or disharmony will not be determined by whether the courts admit the fruits of interspousal

104. *Id.*

105. The principle was discussed in relation to governmental wiretapping in *Olmstead v. United States*, 227 U.S. 438 (1928):

The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties.

Id. (Brandeis, J., dissenting).

106. 322 N.E.2d at 915.

107. A. WESTIN, *PRIVACY AND FREEDOM* 111 (1967).

surveillance. However, in making their decisions, the courts should recognize that admissibility sustains the incentive for spouses to engage in an activity which may result in the needless breakdown of some marriages.

Due process considerations perhaps provide a more compelling reason for courts to find that the fruits of interspousal electronic surveillance are inadmissible in domestic hearings. At stake in most domestic hearings is the disposition of the parties' property interests, which should be accorded the due process safeguard of a fair hearing. As in *Rickenbacker*, where the husband sought to introduce taped recordings of his wife's telephone conversations to defeat her alimony claims,¹⁰⁸ the admission of such illegally obtained evidence would very likely affect the resulting property settlement. In fact, Congress specifically incorporated the due process clause of the fourteenth amendment as a basis of constitutional support for its passage of Title III.¹⁰⁹ In domestic hearings, courts should heed the due process rights of spouses to property and deny the admission of evidence gathered through surreptitious electronic means.

Rather than following the *Beaber* decision courts should adhere to the rationale of *Rickenbacker* and apply Title III's inadmissibility requirement to evidence obtained through interspousal electronic surveillance. Such decisions would discourage the use of electronic surveillance devices and protect the privacy of individuals in communications which Congress sought to guard in Title III, as well as the due process rights to property guaranteed by the Constitution.

PRIVACY AND THE MARITAL RELATIONSHIP

The enactment of Title III and the use of surveillance techniques within the marital home has placed a difficult legal question before the courts: Should a spouse have a statutory right of privacy against his/her marital partner? Both legally and socially, the marital relationship has been traditionally and ideally viewed as an intimate and sharing institution. Mutuality and trust, regarded as keystones of the relationship, involve a considerable sacrifice of individuality for the good of the marital relationship. Each partner necessarily and voluntarily relinquishes a great deal of individual privacy, but it is arguable whether the marital vows should implied-

108. 226 S.E.2d at 348.

109. S. REP. NO. 1097, 90th Cong., 2d Sess. (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2180. See generally Comment, *Interspousal Immunity is not a Defense in Criminal Prosecution for Wiretapping—United States v. Jones*, 542 F.2d 661 (6th Cir. 1976), 11 SUFF. U.L. REV. 1367, 1370 n.26 (1977).

ly extend to a spouse the right to surreptitiously intercept the marital partner's conversations with third parties. Regardless of individual viewpoints on that question, it was the statutory directive of Congress that Title III was applicable to *all* individuals who violated its provisions. Congress was aware that a significant extent of private use of electronic surveillance occurred between marital partners, but did not include it among the activities excepted from the Act's coverage. Yet despite the clear language of the Act, some courts have balked at applying the Act to interspousal surveillance. This reluctance may stem from an unwillingness to protect an individual spouse's privacy against intrusion by the marital partner. Because the concept of individual privacy is so contradictory to the mutuality and openness of the marital relationship, the courts have been understandably hesitant to apply Title III to interspousal surveillance.

The law, however, has slowly come to recognize the legal and personal individuality of each partner in the marital relationship.¹¹⁰ Similarly, the importance of individual privacy has recently gained increasing recognition.¹¹¹ Consequently, while individual privacy protections may at first glance seem an anathema to traditional concepts of marriage, the courts have recognized the need to afford individual spouses legal protection against the marital partner.

Legal Individuality within the Marital Relationship

Within the case law involving interspousal wiretapping and Title III, very little attention has been given to the question of whether a spouse should have a statutory right of privacy against his/her marital partner. The apparent reluctance of the courts to examine the issue of interspousal privacy is in keeping with the common law unwillingness to impose the law into the marital relationship.¹¹² The common law "unity" concept of marriage regarded husband and wife as "one."¹¹³ This approach led to the development of

110. The historical development of the legal individuality of marital partners is traced in K. DECROW, *SEXIST JUSTICE* (1974). The recent Supreme Court decisions in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, (1976), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), represent the extent to which the legal individuality of marital partners has been recognized. See notes 125-30 *infra* and accompanying text.

111. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

112. This reluctance received a constitutional foundation in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

113. See, e.g., Comment, *Interspousal Electronic Surveillance Immunity*, 7 TOL. L. REV. 180, 191 n.32 (1975).

the tort doctrine of interspousal immunity,¹¹⁴ which denied civil actions between husband and wife, and to the legal conclusion that a married woman had no legal identity.¹¹⁵ Marriage, particularly for the woman, involved a surrender of individual legal rights.

Only recently did the law begin to recognize the legal individuality of spouses. In 1960, the Supreme Court in *United States v. Dege*¹¹⁶ held that husband and wife are capable of conspiring with each other to commit an offense against the United States, despite a federal statute¹¹⁷ which rejected the idea. Mr. Justice Frankfurter, for the majority, wrote:

Such an immunity to husband and wife as a pair of conspirators would have to attribute to Congress one of the two assumptions: either that responsibility of husband and wife for joint participation in a criminal enterprise would make for marital disharmony, or that a wife must be presumed to act under the coercive influence of her husband, and, therefore, cannot be a willing participant.¹¹⁸

The statutory presumption that a women acts under the coercive influence of her husband,¹¹⁹ Frankfurter felt, "implies a view of American womanhood offensive to the ethos of our society."¹²⁰ The Supreme Court's decision thus recognized not only that each spouse was an individual capable of his/her own thoughts and actions, but also that the individuality of marital partners should be accorded legal recognition.¹²¹

Recent legal developments have continued the trend. A majori-

114. *Id.* at 193.

115. *Id.*

116. 364 U.S. 51 (1960).

117. 18 U.S.C. § 371 (1948) (criminal conspiracy statute).

118. 364 U.S. at 52.

119. On the doctrine of presumed coercion, see *People v. Stately*, 91 Cal. App. 2d 943, 206 P.2d 76 (1949). For an interesting look at those factors which the courts used to prop up the doctrine, see K. DE CROW, *SEXIST JUSTICE* 157 (1974).

120. 364 U.S. at 53.

121. *Id.* at 55. The trend toward legal individuality of marital partners actually began with the passage of the Married Women's Property Acts. See C. VERNIER, 3 AMERICAN FAMILY LAWS 167, 179-180 (1938). First passed in Mississippi in 1839, similar legislation was later adopted in all American jurisdictions. See *State v. Gardner*, 174 Iowa 748, 156 N.W. 747 (1916). The effects of the legislation are discussed in L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (1969). According to Warren, *Husband's Rights to Wife's Services*, 38 HARV. L. REV. 421, 423 (1925), however, the effect of the legislation was limited: "The interpretation of the Married Women's Acts frequently fell into the hands of judges who as young lawyers had been educated in the legal supremacy of the husband."

ty of states now recognize a wife's right to sue for loss of consortium.¹²² The doctrine of interspousal immunity has been abrogated by twenty states.¹²³ The Equal Opportunity Credit Act of 1976 extended the opportunity for married women to acquire credit in their own right.¹²⁴ While the trend toward legal individuality of marital partners has not gone unchecked,¹²⁵ the law clearly no longer regards husband and wife as a single legal entity.

The individual rights of marital partners were analyzed by the Supreme Court in *Planned Parenthood of Central Missouri v. Danforth*¹²⁶ and *Eisenstadt v. Baird*.¹²⁷ In *Danforth*, the Court ruled that a wife was not required to acquire her husband's consent prior to terminating her pregnancy. While the Court recognized that its decision might have a profound and negative impact on the future of particular marriages,¹²⁸ it felt that "the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution" would best be served by denying the husband the power to veto his wife's decision to have an abortion.¹²⁹

In *Eisenstadt v. Baird*¹³⁰ the Supreme Court examined the privacy right as it related to married and single people. The Court found no distinction:

It is true that in *Griswold* the right to privacy inhered in the marital relationship. Yet the marital couple is not an independent entity with a heart and mind of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental in-

122. See, e.g., *Lombardo v. D.G. Francisco & Co.*, 359 Mass. 529, 269 N.E.2d 836, 839 (1971).

123. See Comment, *Interspousal Electronic Surveillance Immunity*, 7 TOL. L. REV. 185, 190 n.27 (1975).

124. 15 U.S.C. § 1691 (1976).

125. See *Forbush v. Wallace*, 341 F. Supp. 217 (N.D. Ala. 1971), *aff'd per curiam*, 405 U.S. 970 (1972), in which the Supreme Court upheld a state requirement that all married women use their husband's surname on their driver's license.

126. 428 U.S. 52 (1976).

127. 405 U.S. 438 (1972).

128. 428 U.S. at 71.

129. *Id.*

130. 405 U.S. 438 (1972).

trusion into matters so fundamentally affecting a person as the decision to bear or beget a child.¹³¹

Eisenstadt's recognition of the independent nature of each spouse's privacy right is significant for it is the distinct nature of every individual's personal makeup that makes vital the protection of each person's privacy.¹³² It was on that basis that the individual's privacy has been given constitutional protection from governmental intrusion, and it was for this reason the common law long ago refused to sanction private eavesdropping.¹³³

The recent passage of Title III legislation was the attempt of Congress to prevent the widespread abuse of individual privacy through governmental and private use of electronic surveillance.¹³⁴ In applying its provisions to factual situations involving interspousal surveillance, the courts should regard as determinative the question of whether the intermarital surveillance violated a spouse's right to privacy. The adoption of this approach by the courts would recognize the legal individuality of each spouse and serve the intent of Congress by providing the statutory privacy protections of Title III to each individual spouse.

Title III and Intermarital Privacy

Title III's provisions prohibit the interception of all "wire" communications,¹³⁵ and make illegal the interception of all "oral"¹³⁶ com-

131. *Id.* at 453.

132. For a thorough discussion of the functions of individual privacy, see A. WESTIN, *PRIVACY AND FREEDOM* 32-52 (1967). See also Jourard, *Some Psychological Aspects of Privacy*, 31 J. LAW & CONTEMP. PROB. 307 (1966); A. MASLOW, *MOTIVATION AND PERSONALITY* 212-13, 227, 237 (1954); Berle, *The Protection of Privacy*, 79 POL. SCI. Q. 162-68 (1964).

133. Eaves-Droppers, or such as listen under walls or windows or the eaves of a house, to harken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet; or are indictable at the sessions, and punishable by fine and finding sureties for their good behavior.

4 BLACKSTONE, COMMENTARIES 168.

134. See note 6 *supra* and accompanying text.

135. 18 U.S.C. § 2510 (1) (1970).

136. 18 U.S.C. § 2510 (2) (1970). The question of whether or not the Court will rule that intrastate electronic eavesdropping has such a significant effect on interstate commerce so that the Act applies to all eavesdropping activities by private parties remains for future determination. Another possible basis for applying this Act to all eavesdropping activity is through the due process clause of the fourteenth amendment if the Court concludes that wiretapping and electronic eavesdropping violates the individual's right to due process. See Note, *Electronic Surveillance: The New Standards*, 35 BROOKLYN L. REV. 49, 62 (1968).

munications which the speaker could reasonably expect to remain private. The statutory distinction between wire and oral communications was necessitated by the different privacy considerations involved in each form of communication. Wire communications primarily refers to conversations conducted over the telephone. Because the communication is sent over the wire, the participants do not expect their conversation to be overheard. In enacting Title III, Congress recognized and protected the privacy of persons communicating over the telephone by prohibiting *all* interceptions of wire communications. All oral communications, however, are not protected, since they are not sent through enclosed wire, but instead are projected through the air. These communications, exemplified by the everyday conversation on the streetcorner or within the home, are capable of being overheard depending on the circumstances surrounding the conversations. In order to avoid ensnaring the unintentional and innocent overhearer within the provisions of Title III, Congress adopted the guidelines of *Katz v. United States*,¹³⁷ and made illegal only those interceptions of oral communications which, according to the particular factual circumstances, the speaker could reasonably expect to remain private.

The difficulty in imposing Title III's statutory protection of privacy on intermarital relationships is not in the interception of wire communications by a spouse, since *all* private wiretapping was prohibited by Congress. Rather, the difficulty will be in determining which interceptions of a spouse's oral communications merit Title III's privacy protections. Title III makes illegal only those interceptions of oral communications—those communications not transferred by wire—which the speaker could reasonably expect to remain private.¹³⁸ This provision of Title III has not been tested in the courts in an intermarital context.

There are obvious difficulties in determining the circumstances in which a court should find that a spouse's reasonable expectation of privacy was violated by the marital partner. Marital partners enjoy joint access and control of the marital premises. This close physical relationship, accompanied by the intimacy of the personal relationship between spouses, leaves little room for a reasonable expectation that conversations conducted within the home will remain private. Within the marital home, Title III's protection of oral conversations should thus be narrowly applied to extreme factual situa-

137. 389 U.S. 347 (1967).

138. 18 U.S.C. § 2510 (2) (1970).

tions in which a spouse's privacy expectation was clearly justified. When spouses physically separate outside the marital home, however, their individual privacy expectations *vis-a-vis* each other justifiably increase. Depending on particular factual circumstances, the courts should protect the privacy of a spouse's conversations outside the marital home from the intrusion of the other spouse.

In addition to the place where the intercepted conversation occurred, courts should consider whether artificial devices were used to achieve the interception. Such sophisticated technological devices as parabolic microphones,¹³⁹ bugging devices and spike mikes,¹⁴⁰ provide the greatest opportunities for a suspicious spouse to surreptitiously invade a marital partner's private oral conversations. Once installed, the spike mike or bug does not require monitoring. Activated by sound, the devices intercept and record conversations within their perimeter. The parabolic microphone, commonly known as the "big ear," has the ability to intercept conversations taking place over two hundred yards away. The danger of these devices is that their presence goes undetected. Like the wiretap, they violate the individual's expectation that his/her communication will remain private. Their use in interspousal surveillance should be regarded as a violation of a spouse's "reasonable expectation of privacy" and necessitate the protection of the interspousal right to privacy.

In the future, courts may confront factual situations in which it will be difficult to determine whether a spouse was justified in his/her expectation of privacy. Focusing on the place where the intercepted conversation originated and whether electronic means were used to accomplish the interception should aid the courts in determining whether to protect the privacy of the oral communication.

Congress, in enacting Title III, was intent on protecting the privacy of the individual's communications. The courts should not shrink from giving these statutory privacy protections to spouses who have been the victims of intermarital surveillance. The Supreme Court in *Eisenstadt v. Baird*¹⁴¹ emphasized that the law

139. This device is similar to a directional microphone. It can easily pick up speech at a distance of 500 to 600 feet. Larger directional microphones increase this range considerably. See A. WESTIN, *PRIVACY AND FREEDOM* 76 (1970).

140. Spike mikes are attached to the opposite side of the wall of the room in which the conversation to be intercepted will take place. The wall acts as a sounding board, sending acoustical vibrations through thin metallic shafts to a microphone. A recorder can be attached to make a permanent record of the intercepted conversation. *Id.* at 75.

141. 405 U.S. 438 (1972).

now recognizes each spouse as an individual whose personal needs and emotional well-being require individual privacy protections. The courts' application of Title III to interspousal surveillance will respect those individual privacy rights. If, however, the courts continue to recognize an interspousal exception to Title III as established by *Simpson*, the application of the exception should be limited to narrow factual circumstances.

FACTUAL LIMITATIONS TO THE APPLICATION OF THE INTERSPOUSAL EXCEPTION

Despite the doubtful nature of the *Simpson* court's determination of congressional intent, some courts¹⁴² have recognized it as authority for the existence of an interspousal exception to Title III. However, each subsequent decision has factually distinguished *Simpson* and ruled the interspousal wiretap in question to be within the scope of federal wiretap law. The impetus for these determinative factual distinctions was provided by *Simpson* itself. In concluding its opinion, that court expressed uncertainty over its decision:

Our decision is, of course, limited to the specific facts of this case. No public official is involved, nor is any private person other than the appellee, and the *locus in quo* does not extend beyond the marital home of the partes.¹⁴³

Subsequent to *Simpson*, courts have suggested as relevant factual considerations the relationship of the parties, the presence or absence of third-party involvement in the surveillance, and the *locus in quo*, or place in which the interception of the communication occurred.

In examining factual distinctions which have been employed by the courts, it is necessary to remember that if there is no interspousal exception to Title III, all distinctions of fact are meaningless since all private wiretapping is prohibited. Where interspousal immunity is a valid defense to Title III, however, it is necessary to analyze the circumstances in which the defense should be available.

Relationship of the Parties

In the wake of *Simpson*, some courts have attached significance to the relationship of the parties. By definition, the doctrine of in-

142. *Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975); *Beaber v. Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 90 (1975).

143. 490 F.2d at 810.

terspousal immunity applies only where one spouse has brought a civil action against the other marital partner.¹⁴⁴ Thus, in *United States v. Schrimsher*,¹⁴⁵ the Fifth Circuit Court of Appeals found the defendant's wiretapping of his former lover's phone to be in violation of Title III. The court noted that in the absence of a marital relationship, the defendant had no legal right to be on the premises.¹⁴⁶ While physical trespass is not required by Title III to invoke the statutory prohibitions of the Act, the *Schrimsher* court used the trespass of the defendant to buttress its holding and emphasized that the nature of the relationship between the parties was a determinative factor in its decision. A similar analysis was employed by the Sixth Circuit in *United States v. Jones*.¹⁴⁷ Six months prior to the wiretapping activity in question, the defendant wiretapper had moved out of the marital home. During this state of separation, a restraining order was issued to keep the defendant away from his estranged wife's premises. Noting the restraining order and labeling the marriage as "one in name more than fact,"¹⁴⁸ the *Jones* court found the implied statutory exception of *Simpson* inapplicable.

While the *Jones* decision was based in part on the fact that the interspousal surveillance in question had occurred after the husband and wife separated, the Second Circuit Court of Appeals recently found in *Anonymous v. Anonymous*¹⁴⁹ that Title III's remedies were not available to a wife whose telephone conversations were covertly intercepted and recorded by her husband after the spouses had separated.¹⁵⁰ Although the court in *Anonymous* limited its decision to the particular facts of its case,¹⁵¹ the court's complete disregard for the fact that the estranged husband and wife occupied separate premises and were marital partners only in the legal sense implicitly challenges the determination of the court in *Jones* that separated marital partners are subject to the prohibitions and penalties of Title III.

In cases which involve electronic surveillance between separated marital partners courts should consider whether the

144. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 122, at 859-60 (4th ed. 1971).

145. 493 F.2d 848 (5th Cir. 1974).

146. *Id.* at 851.

147. 542 F.2d 661 (6th Cir. 1976).

148. *Id.* at 673.

149. 558 F.2d 677 (2d Cir. 1977), *aff'g* *London v. London*, 420 F. Supp. 944 (S.D.N.Y. 1976).

150. *Id.* at 679.

151. *Id.*

marital relationship present is "one more in name than fact," as the Sixth Circuit Court of Appeals so characterized the status of the separated spouses in *Jones*.¹⁵² Marriage "in fact" elevates physical and psychological intimacy and openness at the expense of each spouse's individual privacy, and courts are thus understandably reluctant to inject Title III's sanctions into the relationship. When marital partners separate, however, the reasons for hesitating to apply the Act's privacy protections are erased. Each partner then acts as an individual and no longer is party to an intimate and sharing relationship, so each separated spouse should be given the full privacy protections of Title III. Furthermore, as commentators have long argued,¹⁵³ the policy arguments used to support interspousal immunity are invalid when applied to separated spouses. Not only has the danger of a collusive suit been minimized, but the domestic tranquility of the partners has vanished and cannot be adversely affected by litigation.¹⁵⁴

If an interspousal exception to Title III exists, it seems clear that the exception should not be applicable to factual situations involving wiretapping between lovers or separated spouses. Rather, the application of interspousal immunity should continue to be narrowly applied to husbands and wives who have maintained the domestic felicity and intimacy that is tantamount to a surrender of individual privacy.

Third-Party Involvement

Interspousal surveillance which involves the intrusion of a third party into the marital relation is proscribed activity, according to case law decided under Title III. This determination, first expressed in *Simpson*,¹⁵⁵ has merit. The relationship of the marital partners has long been viewed, both socially and legally,¹⁵⁶ as one which should be free from public scrutiny and concern. What occurs behind the marital veil is the private concern of husband and wife.¹⁵⁷ On the basis that third party involvement would violate the privacy of the spousal relationship, the court in *Simpson* expressed the opinion that a "third-party intrusion into the marital home would clearly make the wiretapping activity illegal, even if instigated by the

152. 542 F.2d at 673.

153. See, e.g., H. CLARK, LAW OF DOMESTIC RELATIONS 253 (1966).

154. *Id.*

155. 490 F.2d at 809.

156. *Beaber v. Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 910, 915 (1974).

157. *Id.*

other spouse.”¹⁵⁸ The particular language employed by the *Simpson* court is significant because the court applied its literal meaning to the facts of the case. In *Simpson*, the husband conducted the surveillance of his wife and played the recordings of his wife’s telephone conversations to various neighbors, family members, and a lawyer. Apparently because the husband had not involved a third-party in the surveillance of his wife, the court accorded him the defense of interspousal immunity to the Title III action brought by his wife.

While it is questionable whether Congress intended to incorporate the interspousal exception discovered by the *Simpson* court, it is clear that Congress intended to protect individual privacy.¹⁵⁹ If the husband in *Simpson* cannot be said to have violated his wife’s statutory privacy by wiretapping her conversations, it seems clear that he still violated her privacy by playing the taped recordings of her conversations to third parties. The *Simpson* court’s failure to recognize that exposure of the fruits of the surveillance to third parties was a violation of Title III’s individual privacy protection subverted the intent of Congress.

The Fifth Circuit appears to have reached this incongruous result because of a misplaced emphasis on the importance of the physical areas of the marital home, rather than the marital relationship. The justification for an interspousal exception to Title III does not arise because of the physical area of the marital home, but rather from the intimate nature of the interspousal marital relationship. Third-party surveillance, when instigated by a spouse is equally as objectionable if accomplished, for instance, by a wiretap on the marital partner’s office phone, as it would be as if it were achieved by a wiretap on the phone located within the marital home. In each case the husband would be guilty of violating the trust and confidence of the marital relationship, which is the basis for an interspousal exception to the privacy protections of Title III. In *Simpson*, the husband’s exposure of the fruits of the wiretap to third parties was as violative of his wife’s privacy as if he had employed a third party to conduct the surveillance.

In *Remington v. Remington*,¹⁶⁰ both forms of third-party involvement—surveillance and exposure to the fruits of the surveillance—were instigated by the defendant-spouse. While the

158. 490 F.2d at 809.

159. See note 6 *supra* and accompanying text.

160. 393 F. Supp. 898 (E.D. Pa. 1975).

Remington court did not attribute its decision to either form of third-party involvement, it regarded the widespread involvement of third parties to be a "gross invasion of the wife's privacy."¹⁶¹ Although the *Remington* court did not question the *Simpson* result, the decision reflects the approach courts should take toward third-party involvement instigated by a spouse. Any third-party involvement instigated by a spouse that *violates the privacy* of the marital partner, whether by third-party surveillance or by exposure of the fruits of the surveillance to third parties, should bring the wiretap within the scope of Title III.

This approach would give the individual marital partner the statutory privacy protections which Congress intended, and it would also prevent an abuse of privacy which is peculiar to electronic surveillance. Not only can the wiretap intercept the conversation at the moment it occurs, the wiretap can also record the conversation and preserve it for other uninvited ears not present at the moment of interception. A refusal to sanction one spouse's exposure of the recorded conversations of the marital partner to third parties will serve the congressional attempt to curb the peculiar capacity of electronic surveillance to abuse individual privacy.

The Locus in Quo

One of the more questionable factual considerations which has been recognized by the courts in interspousal wiretapping cases involves the *locus in quo*.¹⁶² The factual element was initially recognized by the *Simpson* court,¹⁶³ apparently for the purpose of establishing the wiretap in that case as a purely interspousal concern. That court's recognition of the interspousal exception to Title III was buttressed by the fact that both the wife's conversation and the husband's interception of her conversation occurred within the marital premises. Although the *Simpson* statement regarding the *locus in quo* has been noted by other courts,¹⁶⁴ that factor has not played a determinative role in any case subsequent to *Simpson*. It is questionable whether either the location of a spouse's conversation or the place of the wiretap should significantly influence a court's

161. *Id.* at 901.

162. *Locus in quo* refers to the place in which the cause of action arose. BLACK'S LAW DICTIONARY 1090 (4th ed. 1968). Within the context of electronic surveillance, it refers to either the place where the intercepted conversation originated, or to where the interception occurred.

163. 490 F.2d at 810.

164. See, e.g., *United States v. Jones*, 542 F.2d 667, 673 (6th Cir. 1976).

determination that particular interspousal surveillance does or does not fall within the exception to Title III recognized by *Simpson*.

The court in *Jones* was not convinced "that the location of the surveillance device had any relevance in ascertaining the scope of the statute."¹⁶⁵ Indeed, whether a suspicious spouse installs a surveillance device within the confines of the home or attaches it to the telephone line just off the marital property seems to be a meaningless distinction.

Similarly, while the location from which the intercepted conversation originated might appear to have significance, it is important to note that the application of the doctrine of interspousal immunity has never been determined by the *locus in quo*.¹⁶⁶ Since the validity of the interspousal exception to Title III is premised upon the intimacy and openness of the intermarital relationship, attaching legal significance to the place where the intercepted conversation originated would be irrelevant to the original basis of the interspousal exception. Interspousal immunity to Title III provisions implies that no privacy protections are warranted between spouses. That determination, again, is based on the nature of the marital relationship, which does not vary with the physical location of the spouses.

In summary, if the courts continue to recognize the interspousal exception to Title III established by the Fifth Circuit in *Simpson*, the application of the exception should be limited to narrow factual circumstances. The courts should not consider the *locus in quo* in determining whether interspousal immunity is a valid defense for a particular wiretapping defendant. Neither the location of the surveillance device nor the place wherein the intercepted conversation originated bears relevance to a determination of the scope of Title III. Courts should, however, recognize as significant factual considerations regarding the relationship of the parties and the presence or absence of third-party involvement. Only in those factual situations where interspousal wiretapping has occurred between marital partners, free of any third-party involvement that violates the privacy of a marital partner, should interspousal immunity be a valid defense to a Title III action. This narrow applica-

165. *Id.*

166. Those policy reasons which have been used to support interspousal immunity are not related to a particular place, but rather arise out of the nature of the marital relationship. For an outline of the policy arguments in support of interspousal immunity, see H. CLARK, *LAW OF DOMESTIC RELATIONS* 253 (1968).

tion of the interspousal exception best serves the purposes of Congress in enacting Title III.

CONCLUSION

It is probable the future will see an increase in interspousal electronic surveillance. Within a society plagued by increasing marital disharmony, technological developments in electronics will provide suspicious spouses with an increased capacity to intercept and record the infidelity and inferences of infidelity of marital partners. Present case law will support the use of electronic surveillance devices between spouses and allow the fruits of interspousal eavesdropping to be admitted as evidence in divorce, custody, and support hearings.

The courts' response to interspousal electronic surveillance should be to remove the incentive for spouses to engage in electronic surveillance. The courts should hold that the fruits of interspousal surveillance are not admissible in any judicial proceeding, and courts should apply those civil and criminal penalties contained in Title III to spouses who use electronic surveillance to intercept their marital partners' conversations. This response by the courts would work to deter interspousal electronic surveillance, and protect the individual privacy in communications which Congress intended in Title III.